Supreme Court, U.S.
FILED
FEB 2 1994
CLERK

No. 93-874

In the Supreme Court of the United States

OCTOBER TERM, 1993

HENRY ROBERT GREWE AND KATHY ANNE GREWE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

KENNETH L. GREENE
JOY L. PRITTS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' request for attorneys fees in connection with their judicial challenge to tax collection activities of the United States was properly denied because of petitioners' failure to exhaust available administrative remedies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Becker's Motor Transp. Inc., In re, 632 F.2d 242 (3d Cir. 1980), cert. denied, 450 U.S. 916 (1981)	11
Chambers, In re, 91-2 U.S.T.C. ¶ 50,355 (Bankr. N.D. Ill. 1961), aff'd, 69 A.F.R.T.2d 976 (N.D. Ill. 1992)	10
Davis, In re, 899 F.2d 1136 (11th Cir. 1990)	11
Graham v. *United States*, 981 F.2d 1135 (10th Cir. 1992)	10, 11
Hanson, In re, 69 A.F.T.R.2d 720 (Bankr. E.D. Mo. 1992)	10
IRS v. *Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991)	7, 9, 10, 11
Kenlin Industries, Inc. v. *United States*, 927 F.2d 782 (4th Cir. 1991)	7
Kiker v. *United States*, 98 Bankr. 103 (Bankr. N.D. Ga. 1988)	10
Northwest Cinema Corp., In re, 49 Bankr. 479 (Bankr. D. Minn. 1985)	6
O'Connor v. *United States Dep't of Energy*, 942 F.2d 771 (10th Cir. 1991)	11
Perroton v. *Gray*, 958 F.2d 889 (9th Cir. 1992)	11
Resyn Corp. v. *United States*, 945 F.2d 1279 (3d Cir. 1991)	8
United States v. *McPeck*, 910 F.2d 509 (8th Cir. 1990)	7, 10
United States v. *Yochum*, 156 Bankr. 816 (D. Nev. 1993)	10

Statutes: Page

Bankruptcy Code, Ch. 7, 11 U.S.C. 701 *et seq.* 2
Equal Access to Justice Act, 28 U.S.C. 2412:
28 U.S.C. 2412 2
28 U.S.C. 2412(e) 3, 5
Internal Revenue Code of 1954 (26 U.S.C.):
§ 7430 ..... 3, 4, 5, 7-8, 9, 10, 11-12
§ 7430(a) 3, 5, 7
§ 7430(b)(1) 3, 6
§ 7430(c)(6) 5, 7, 8, 11
28 U.S.C. 151 8
28 U.S.C. 152(a) 8
28 U.S.C. 157 8
28 U.S.C. 157(a)(1) 8
28 U.S.C. 157(c)(1) 3, 4, 8, 9
28 U.S.C. 451 ..... 11, 12
28 U.S.C. 1334(a) 8

Miscellaneous:

H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. (1986) 12
H.R. Rep. No. 404, 97th Cong., 1st Sess. Pt. II (1981) 12

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-874

HENRY ROBERT GREWE AND KATHY ANNE GREWE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 4 F.3d 299. The opinion of the district court (Pet. App. 17a-18a) is unreported. The proposed findings of fact and conclusions of law entered by the bankruptcy court (Pet. App. 19a-31a) are reported at 148 Bankr. 824.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1993. The petition for a writ of certiorari was filed on December 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, the Internal Revenue Service made assessments against petitioners for deficiencies in income tax for the 1977-1980 tax years. Petitioners thereafter filed a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code. On March 21, 1990, petitioners received a discharge of their debts, including their unpaid federal tax liabilities for 1977-1980. Their bankruptcy case was closed shortly thereafter (Pet. App. 2a). "Apparently ignorant of the discharge" (*id.* at 3a), in February 1992 the IRS sent petitioners a notice of intent to levy on petitioners' property to collect their unpaid 1980 income taxes. The IRS also filed a notice of federal tax lien against petitioners' property.

Petitioners failed to invoke available administrative procedures to obtain abatement of these tax collection efforts (Pet. App. 3a). Instead, in March 1992, petitioners reopened their bankruptcy case and filed a complaint asserting that the IRS was wrongfully seeking to collect taxes that had been discharged. Upon receiving the complaint and learning that petitioners' tax debts had been discharged, the government conceded that petitioners were not liable for the taxes and agreed to remove the lien against petitioners' property (*ibid.*). The government also acknowledged that petitioners were entitled to receive income tax refunds that had been improperly credited against the discharged tax liabilities for 1977-1980. See Pet. 8.

2. Following the government's concession, petitioners filed a motion for an award of attorneys fees against the United States (Pet. App. 3a). Petitioners based their request on the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, which authorizes an award of fees against the United States in carefully limited situations. The

government noted that one of the express limitations of EAJA is that it does not apply "in connection with any proceeding to which Section 7430 of the Internal Revenue Code of 19[54] applies" (28 U.S.C. 2412(e)). Section 7430 of the Internal Revenue Code applies "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under [Title 26]" (26 U.S.C. 7430(a)). Section 7430 thus provides the exclusive basis for the award of fees in tax-related litigation involving the United States. Section 7430 provides, moreover, that attorneys fees may *not* be awarded against the United States in such litigation "unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service" (26 U.S.C. 7430(b)(1)). Since petitioners failed to pursue their administrative remedy with the IRS, and instead moved immediately to obtain judicial relief, the United States contended that Section 7430(b)(1) precludes any award of attorneys fees in this case.

"The parties * * * agreed to submit the matter to the bankruptcy court pursuant to 28 U.S.C. § 157(c)(1), under which the bankruptcy court would make proposed findings of fact and conclusions of law and submit them to the district court for a *de novo* review and entry of a final order" (Pet. App. 3a).[1]

---

[1] For cases (such as the present one) that are not "core" bankruptcy proceedings, 28 U.S.C. 157(c)(1) authorizes the bankruptcy court to "hear" the case and to "submit proposed findings of fact and conclusions of law to the district court." *Ibid.* In such cases, the statute provides that "any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after

The bankruptcy court concluded that Section 7430 of the Internal Revenue Code does not apply to this case (Pet. App. 21a-22a). In the court's view, Section 7430 applies only to proceedings "brought under Title 26" (Pet. App. 22a):

> The proceeding in the case at bar is rooted in the I.R.S. violation of a § 524 discharge, not in the determination, collection, or refund of any tax. To find that the proceeding is one in connection with the determination, collection, or refund of any tax on the basis that the I.R.S. filed a notice of intention to levy regarding previously discharged taxes, would be to elevate form over substance. In substance, these proceedings were brought clearly within the purview of a Bankruptcy Code violation and not * * * in connection with the determination, collection, or refund of any tax.

Having concluded that Section 7430 does not apply to this case, the bankruptcy court stated that petitioners' attorneys fee request should be evaluated under the standards of EAJA. Since EAJA contains no requirement that litigants exhaust available administrative remedies as a precondition to an award of fees, the bankruptcy court recommended that petitioners be awarded attorneys fees in the amount of $2,035 (Pet. App. 31a).

3. The bankruptcy court submitted its proposed findings of fact and conclusions of law to the district court for plenary review pursuant to 28 U.S.C. 157(c)(1). See note 1, *supra*. After conducting the *de novo* review provided by that statute, the district court entered an order adopting the bankruptcy court's proposed findings of fact

---

reviewing de novo those matters to which any party has timely and specifically objected." *Ibid.*

and conclusions of law in their entirety (Pet. App. 17a-18a).

4. The court of appeals reversed (Pet. App. 1a-15a). The court noted that "EAJA does not apply to all actions for attorneys' fees against the United States" (*id.* at 5a) and expressly does "not apply to any costs, fees, and other expenses in connection with any proceeding to which Section 7430 of the Internal Revenue Code applies" (*ibid.*, quoting 28 U.S.C. 2412(e)). The court therefore first examined whether Section 7430 applies to this proceeding.

The court of appeals rejected the lower courts' suggestion that Section 7430 applies only to requests for attorneys' fees in proceedings "brought under Title 26." The court held that Section 7430 applies "to *any* 'administrative or court proceeding' brought in connection with 'the determination, collection or refund of any tax' *imposed* by Title 26" (Pet. App. 7a). Since the "lawsuit which spawned [petitioners'] request for attorneys' fees stemmed from the IRS's impermissible attempt to collect taxes which had previously been discharged" (*id.* at 9a), "the proceedings in the present case were clearly 'brought * * * in connection with the * * * collection * * * of any tax,' as described in 26 U.S.C. § 7430(a)" (*ibid.*).

The court of appeals also rejected petitioners' further assertion that Section 7430 "does not apply in the present case because the proceedings giving rise to their attorneys' fee request are not 'administrative or court proceeding[s]' under 26 U.S.C. § 7430(a)" (Pet. App. 9a). Section 7430(c)(6) of the Internal Revenue Code defines a "court proceeding" as "any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court)." 26 U.S.C. 7430(c)(6). The court of appeals noted that, under the bankruptcy

system enacted in the Bankruptcy Amendments and Federal Judgeship Act of 1984, district courts exercise original jurisdiction over all "matters and proceedings in bankruptcy" and that, "while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, *i.e.*, the district court" (Pet. App. 11a-12a, quoting *In re Northwest Cinema Corp.*, 49 Bankr. 479, 480 (Bankr. D. Minn. 1985)). The court of appeals concluded that, "[b]ecause district courts clearly constitute 'court[s] of the United States' and bankruptcy courts are not separate from, but rather units or divisions of the district court, we think Congress also intended bankruptcy courts to qualify as 'court[s] of the United States' under § 7430(c)(6)" (Pet. App. 12a). The court further noted that applying Section 7430 to bankruptcy proceedings conducted in district court is consistent with Congress's desire that parties exhaust available administrative remedies before seeking judicial relief in federal tax disputes (*id.* at 13a).

In the present case, petitioners failed to exhaust the administrative remedies available to them (Pet. App. 14a). "Because [they] failed to pursue this administrative remedy, but instead challenged the IRS' actions by immediately filing suit in the bankruptcy court, they cannot recover attorneys' fees under § 7430" (Pet. App. 14a). See 26 U.S.C. 7430(b)(1).

ARGUMENT

The court of appeals correctly held that, because petitioners did not exhaust available administrative remedies, they are not entitled to an award of attorneys fees in this tax-related litigation. That determination does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Section 7430 of the Internal Revenue Code governs the award of attorneys fees "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under [Title 26]" (26 U.S.C. 7430(a)). The court of appeals correctly held that Section 7430 is not limited to cases "brought under Title 26." Instead, it reaches any case brought "in connection with the determination, collection, or refund" of any tax imposed under Title 26 (Pet. App. 7a). Accord, *IRS* v. *Brickell Investment Corp.*, 922 F.2d 696, 702 (11th Cir. 1991); *United States* v. *McPeck*, 910 F.2d 509, 513 (8th Cir. 1990). Since this case was filed "in connection with" the government's collection of a tax imposed under Title 26, Section 7430 governs petitioners' request for attorneys fees. Having failed to exhaust their available administrative remedies before commencing suit, however, petitioners are not entitled to any recovery of fees under the express mandate of Section 7430(b)(1) (Pet. App. 14a). See also *Kenlin Industries, Inc.* v. *United States*, 927 F.2d 782, 789 (4th Cir. 1991) (the failure to exhaust administrative remedies "is conclusive against an award of attorney's fees" under Section 7430); *IRS* v. *Brickell Investment Corp.*, 922 F.2d at 703-704.

2. On the matters addressed to this point, there is no disagreement among the courts of appeals. The courts have, however, chosen different routes in the process of reaching consistent conclusions on these issues.

a. Section 7430 authorizes an award of fees in tax-related litigation brought in any "court of the United States" (26 U.S.C. 7430(c)(6)). In the present case, the court of appeals concluded that the bankruptcy court acts as a "unit" of the district court and therefore has jurisdiction to consider a fee application under Section

7430. Pursuant to 28 U.S.C. 157(c)(1), the bankruptcy court may enter proposed findings of fact and conclusions of law on an attorneys fee application under Section 7430. The district court then reviews the bankruptcy court's recommendation *de novo*. 28 U.S.C. 157(c)(1). Only the district court, not the bankruptcy court, may enter a final judgment on the fee application. See *ibid.*

As the court of appeals observed (Pet. App. 11a-12a), bankruptcy proceedings are technically brought in United States District Courts, which unquestionably are "court[s] of the United States." The district courts have original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. 1334(a), and bankruptcy judges "serve as judicial officers of the United States district court established under Article III of the Constitution." 28 U.S.C. 152(a). Bankruptcy judges "constitute a unit of the district court * * * known as the bankruptcy court" (28 U.S.C. 151). See *Resyn Corp.* v. *United States*, 945 F.2d 1279, 1284 (3d Cir. 1991) ("It is undisputed that the bankruptcy courts are units of the district courts under 28 U.S.C. § 151")). They derive their jurisdiction through 28 U.S.C. 157(a)(1), which authorizes district courts to refer bankruptcy matters at their discretion to bankruptcy courts. As the court of appeals observed (Pet. App. 11a-12a), the district courts retain the power to withdraw any reference to the bankruptcy court. 28 U.S.C. 157. Because a bankruptcy action is technically brought in the district court, the court of appeals correctly concluded (Pet. App. 9a-12a) that a bankruptcy proceeding is a court proceeding within the meaning of Section 7430.[2]

[2] Contrary to petitioners' suggestion (Pet. 17), the fact that Section 7430(c)(6) contains a parenthetical specifying that the term

b. Petitioners err in asserting (Pet. 12-13) that the decision of the court of appeals conflicts in this regard with the Eleventh Circuit's decision in *IRS* v. *Brickell Investment Corp.*, 922 F.2d 696 (1991). Although the reasoning employed by the two courts differs, the ultimate result in these cases is the same. Both courts held that Section 7430 governs a request for the award of attorneys fees in a bankruptcy proceeding involving the collection of taxes. See Pet. App. 13a-14a; 922 F.2d at 702. Both courts also held that a taxpayer who fails to exhaust available administrative remedies for a challenged tax collection activity prior to filing a complaint in a bankruptcy proceeding may not recover fees under Section 7430. See Pet. App. 14a; 922 F.2d 703-704.

It is true that the Eleventh Circuit concluded that a bankruptcy court is not a "court of the United States" and therefore lacks jurisdiction of its own to enter an award of attorneys fees against the government. 922 F.2d at 701. The court concluded, however, that the bankruptcy court is authorized by 28 U.S.C. 157(c)(1) to enter proposed findings of fact and conclusions of law and to submit them to the district court for its *de novo* re-

"court of the United States" includes the Tax Court and the Court of Federal Claims does not indicate that Congress implicitly intended to exclude bankruptcy courts from Section 7430. As the court of appeals noted in this case (Pet. App. 12a), because district courts have original jurisdiction over bankruptcy proceedings and bankruptcy courts function as a unit of the district court, there is no need specifically to reference bankruptcy courts in the statute. By contrast, neither the Tax Court nor the Court of Federal Claims is part of the district court. Specific reference to those courts was therefore necessary to ensure their inclusion in the statute.

view. 922 F.2d at 701-702.[3] The exact procedure specified by the Eleventh Circuit in *Brickell Investment* is, of course, the very procedure that was followed in this case. See Pet. App. 3a. Indeed, petitioners *stipulated* in this case (*ibid.*):

> to submit the matter to the bankruptcy court pursuant to 28 U.S.C. § 157(c)(1), under which the bankruptcy court would make proposed findings of fact and conclusions of law and submit them to the district court for a *de novo* review and entry of a final order.

Both the procedure, and the governing substantive law, for detemining fees in *Brickell Investment* and in the present case are thus identical. The federal courts have consistently held that Section 7430—not EAJA—applies to bankruptcy cases involving federal taxes. See *IRS* v. *Brickell Investment Corp.*, 922 F.2d at 702; *United States* v. *McPeck*, 910 F.2d at 513; *Graham* v. *United States*, 981 F.2d 1135, 1139 (10th Cir. 1992); *In re Hanson*, 69 A.F.T.R.2d 720, 721 (Bankr. E.D. Mo. 1992); *Kiker* v. *United States*, 98 Bankr. 103, 105-106 (Bankr. N.D. Ga. 1988); *In re Chambers*, 91-2 U.S.T.C. ¶ 50,355, at 89,247 (Bankr. N.D. Ill. 1991), aff'd, 69 A.F.T.R.2d 976 (N.D. Ill. 1992).[4] Petitioners cite no case to the contrary.

---

[3] Similarly, in *United States* v. *Yochum*, 156 Bankr. 816 (D. Nev. 1993), on which petitioners erroneously rely (Pet. 12), the district court determined that Section 7430 governs the award of attorneys fees in a tax matter before the bankruptcy court and that the bankruptcy court is to prepare proposed findings of fact and conclusions of law to be submitted to the district court. 156 Bankr. at 818-819.

[4] No court of appeals has adopted the scheme that petitioners propose, under which EAJA would apply in bankruptcy cases involving federal tax controversies and Section 7430 would not. In-

There is thus no conflict in the results of these decisions to warrant further review.

c. Petitioners also err in asserting (Pet. 12-14 & n.9) that the decision in this case conflicts with *In re Becker's Motor Transp. Inc.*, 632 F.2d 242 (3d Cir. 1980), cert. denied, 450 U.S. 916 (1981), and *Perroton* v. *Gray*, 958 F.2d 889 (9th Cir. 1992). In those cases, the courts of appeals held that bankruptcy courts are not "court[s] of the United States" within the meaning of 28 U.S.C. 451. That statute, however, expressly defines the term "court of the United States" only "[a]s used in [Title 28]". 28 U.S.C. 451. The present case, by contast, involves a definitional provision contained in Title 26, not Title 28. See 26 U.S.C. 7430(c)(6).

Notwithstanding the express limitation to Title 28 contained in the plain language of 28 U.S.C. 451, and the absence of any cross-reference between 26 U.S.C. 7430 and Title 28, petitioners invoke (Pet. 13) an item of the legislative history of Section 7430 that indicates that Congress looked to the definition of "court of the United States" set forth in 28 U.S.C. 451 when enacting Section

---

stead, the courts have found both EAJA and Section 7430 applicable in bankruptcy proceedings and that Section 7430 takes precedence in tax-related matters in bankruptcy courts. See *O'Connor* v. *United States Dep't of Energy*, 942 F.2d 771 (10th Cir. 1991) (EAJA applies in a bankruptcy proceeding); *Graham* v. *United States*, 981 F.2d 1135 (10th Cir. 1992) (Section 7430 applies in a bankruptcy proceeding involving federal taxes). See also *In re Davis*, 899 F.2d 1136 (11th Cir. 1990) (EAJA applies in a bankruptcy proceeding, and bankruptcy court is to submit proposed findings of fact and conclusions of law to the district courts); *IRS* v. *Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991) (Section 7430 applies in a bankruptcy proceeding involving federal taxes, and bankruptcy court is to submit proposed findings of fact and conclusions of law to the district courts).

7430. See H.R. Rep. No. 404, 97th Cong., 1st Sess. 12 n.1 (1981). The legislative history of subsequent amendments to the statute indicates, however, that Congress anticipated that Section 7430 would apply "in a tax case in *any* Federal court." H.R. Conf. Rep. No. 841, 99th Cong. 2d Sess. Pt. II, at 800 (1986) (emphasis added).

The issue presented in this case is whether Section 7430 of Title 26 governs the award of attorneys' fees in a bankruptcy proceeding involving the assessment or collection of taxes. Petitioners' suggestion (Pet. 17-18) that the resolution of this issue may have broad implications for the power of the bankruptcy courts under various provisions of Title 28 is unfounded. The court of appeals did not rely on, or seek to interpret, 28 U.S.C. 451 in reaching its decision in this case. The appropriate context for addressing any conflict that may develop in the future under Title 28 would be when, and if, such a conflict of decisions is in fact presented. Since the result in the present case would be identical whether the approach of *Brickell Investment* or of the court below were adopted, this case does not represent an appropriate occasion for addressing the conflict that petitioners anticipate may hereafter occur in cases under Title 28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

KENNETH L. GREENE
JOY L. PRITTS
Attorneys

FEBRUARY 1994